STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 21, 2000
v	No. 206748 Oakland Circuit Court
PHILLIP M. OLDHAM, Defendant-Appellant.	LC No. 97-150562-FH

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to deliver less than fifty grams of cocaine, MCL 750.157a, 333.7401(2)(a)(iv); MSA 28.354(1), 14.15(7401)(2)(a)(iv). He was sentenced as a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, to three to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from the controlled purchase of cocaine by an undercover police officer. The prosecutor's theory of the case was that defendant conspired with his girlfriend and brother to sell the cocaine. The defense theory was that defendant, although present, was not involved in the illegal transaction.

I

Defendant first argues that the trial court erred in allowing a police witness to testify regarding statements made by defendant's brother, implicating defendant as a coconspirator. We disagree. The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995).

MRE 801(d)(2)(E) excludes from the definition of hearsay "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." To allow such a statement into evidence, the trial court must determine, by a preponderance of evidence aside from the statement in question, that a conspiracy existed. *People v Rockwell*, 188 Mich App 405, 408; 470 NW2d 673 (1991). Moreover, "[a] trial court … may admit a co-conspirator's

statement contingent upon later production of the independent evidence …." *People v Till*, 115 Mich App 788, 794; 323 NW2d 14 (1982). For this purpose, a conspiracy may be established by circumstantial evidence and inferences. *Id.* A trial court's finding that a statement was uttered by a coconspirator in furtherance of a conspiracy is reviewed for clear error. *People v Bushard*, 444 Mich 384, 396; 508 NW2d 745 (1993) (Boyle, J., joined by Griffin, J.), citing *United States v Maldonado-Rivera*, 922 F2d 934, 959 (CA 2, 1990).

In this case, when the defense initially objected to the witness' testimony concerning defendant's brother's statements, the trial court acknowledged that no conspiracy had yet been shown and so instructed the jury. Defense counsel did not subsequently renew the objection at the conclusion of the prosecution's proofs to properly present this issue for appeal. In any event, evidence was subsequently presented that defendant arrived and remained among the perpetrators at the scene of the crime, and that the two marked ten-dollar bills that the police used in the transaction were found on defendant's person. Further, a police witness testified that defendant's girlfriend, who provided the cocaine, handed the marked money to defendant upon the drug purchase and that "when … she said that she only had one [rock of cocaine], I remember [defendant] saying that they had some more back in the room."

In light of this evidence, had defense counsel objected that independent evidence failed to establish the existence of a conspiracy for purposes of allowing the testimony about the brother's statements, the trial court would have had an ample basis for ruling that the evidence was properly before the jury. For the same reason, we have ample basis for affirming the trial court's admission of the evidence in the first instance.

II

Defendant next argues that the trial court erred in allowing a police witness to testify concerning drugs and drug paraphernalia, seized at the time of arrest, that were not included in the charges at issue because (1) the district court had barred the evidence at the preliminary examination, and (2) the evidence was more prejudicial than probative. We conclude that the trial court correctly identified the evidence as bearing on the totality of the circumstances of the incident in question and properly allowed the jury to consider it for that purpose.

According to the testimony, the seized items were in the room where defendant was arrested. The transaction at issue took place outside the room, but, just before the transaction, defendant went into the room to get more cocaine. Defendant concedes that this evidence "may have been part of the 'circumstances,'" but, citing MRE 403, insists that the danger of unfair prejudice outweighed its probative value.

MRE 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice …." The weighing of prejudice against probative value under MRE 403 is entrusted to the trial court's discretion. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). An abuse of discretion occurs where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996). There was no abuse of discretion in this instance.

The trial court cautioned the jury that "what was found in that room is not part of the charge, but it's part of the totality of circumstances" and directed the jury "not to consider what's in the room as a charge against this Defendant." Further, when the prosecutor attempted to develop that issue more fully, the court took the initiative to reiterate the limited relevance of the evidence and constrain that development.

Because the evidence of drug activity in the apartment bore on the questions of defendant's knowledge of the nature of the business at hand, and his possible role in it, it was proper for the jury to consider it. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The trial court's cautionary instructions minimized any undue prejudice that otherwise might have occurred, by informing the jury of the limited relevance of the evidence in question and reminding the jury that defendant was not charged in connection with any of the contraband or paraphernalia described in that testimony. Thus, the trial court evidenced no perversity of will or defiance of judgment in admitting the evidence.

Further, defendant presents no authority for the proposition that a trial court is bound by an evidentiary decision made by the district court in a pretrial proceeding and, in fact, develops no argument concerning the decision of the district court. We decline to consider this issue. An appellant must appropriately argue the merits of the issues identified on appeal. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

III

Next, defendant asserts that the trial court improperly allowed one witness to disparage the credibility of another. This argument is without merit.

A police witness qualified as an expert in the field of drug trafficking was asked why he chose to detain defendant as a suspect despite protestations by defendant's girlfriend, who actually delivered the cocaine to the undercover officer, that defendant had nothing to do with the sale. The expert explained that the girlfriend was suspiciously eager to insulate defendant and take all the responsibility herself. Further, he indicated that the girlfriend was "from the streets" and knew she had little to lose by assuming that posture.

Defense counsel objected to this testimony on the ground that it was speculative. To preserve an evidentiary issue for appellate review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). Because the objection at trial concerned the witness' suppositions regarding defendant's girlfriend's mindset, and the argument on appeal concerns the witness' assessment of the girlfriend's credibility, the objection below did not preserve for appellate review the issue raised here. Accordingly, we need not address this issue. In any event, defendant's argument is without merit.

"Credibility is a matter for the trier of fact to ascertain." *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Expert testimony is generally inadmissible to opine on the credibility

of witnesses. *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987). Here, however, defendant's girlfriend did not herself appear at trial, and her statements or demeanor as reported by others did not originate as testimony under oath. Thus, the girlfriend was not a witness, and the jury was not required to assess her credibility in the ordinary sense. Accordingly, the police expert's indications that he doubted the girlfriend's veracity when he initially questioned her did not invade the jury's exclusive province to determine a witness' credibility. There was no error in the admission of this testimony.

IV

Finally, defendant challenges the sufficiency of the evidence to support his conviction of conspiracy. When reviewing the sufficiency of evidence in a criminal case, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proved beyond a reasonable doubt. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

A conspiracy is "a combination with others to do what is unlawful." *People v Atley*, 392 Mich 298, 310; 220 NW2d 465 (1974). "Direct proof of agreement is not required, nor is it necessary that a formal agreement be proven. It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact." *Id.* at 311.

"Mere presence, even with knowledge that an offense is planned or is being committed, is insufficient to establish that the defendant aided or assisted in the commission of the crime." *People v Cummings*, 171 Mich App 577, 582; 430 NW2d 790 (1988), quoting CJI 8:1:06.[1] However, "conspiracy may be established, and frequently is established by circumstantial evidence, and may be based on inference." *Atley, supra* at 311 (citations omitted).

Defendant argues that evidence that he was near the person who actually sold the cocaine to the undercover officer, and that the two marked ten-dollar bills were found in his pocket, was insufficient to support the guilty verdict on the conspiracy charge. However, the jury had before it more evidence of defendant's participation in a conspiracy than defendant suggests: According to the testimony, the illegal transaction occurred in a building whose address defendant gave as his own, in an area known for drug trafficking. The room in which defendant was found and arrested contained drugs and related paraphernalia. Defendant's brother indicated that, for the drug sale to take place, it was necessary to wait for another person, after which defendant and his girlfriend arrived. The undercover officer testified that defendant's girlfriend handed the marked ten-dollar bills to defendant, and that he remembered that when he asked about purchasing a second quantity of cocaine, defendant said that there was more in another room.

This evidence, considered as a whole and in a light most favorable to the prosecution, is sufficient for a reasonable trier of fact to conclude beyond a reasonable doubt that defendant was part of a conspiracy to sell the cocaine.

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry William Saad

[1] CJI 8:1:06 has been replaced by CJI2d 8.5.